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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

MARY KIM PICCININI, and	)	3:17-cv-00584-HDM-WGC
GEORGE ELDRIDGE & SON, INC.,	)	
	)	
Plaintiffs,	)	ORDER
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
_____	)	
	)	

Before the Court is the Defendant United States of America's ("Defendant") partial motion to dismiss (ECF No. 9) made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs Mary Kim Piccinini and George Eldridge & Son, Inc., (collectively "Plaintiffs") have opposed (ECF No. 14), and Defendant has replied (ECF No. 17).

**I. BACKGROUND**

This case is brought under the Federal Tort Claims Act ("FTCA") and arises from a prescribed burn initiated by the United States Forest Service on public land in White Pine County, Nevada, in 2012, that expanded into areas outside the prescribed burn area

1 causing damage to Plaintiffs' properties (See ECF No. 1).  
2 Plaintiffs brought suit against Defendant asserting claims for: (1)  
3 negligence; (2) nuisance; (3) trespass; (4) strict liability; and  
4 (5) res ipsa loquitur (*Id.* at 5-7). Plaintiffs also seek punitive  
5 damages and attorney's fees (*Id.* at 7).

## 6 **II. LEGAL STANDARDS**

### 7 **A. Motion to Dismiss under Fed.R.Civ.P. 12(b) (1)**

8 A motion to dismiss for lack of subject matter jurisdiction  
9 under Fed.R.Civ.P. 12(b) (1) may be made on the basis that the  
10 complaint fails to allege grounds for federal subject matter  
11 jurisdiction as required by Fed.R.Civ.P. 8(a). *Meliezer v.*  
12 *Resolution Trust Co.*, 952 F.2d 879, 881 (5th Cir. 1992); *Thornhill*  
13 *Publ'g Co. v. General Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir.  
14 1979). Although the defendant is the moving party on a motion to  
15 dismiss, it is the plaintiff who, as the party seeking to invoke  
16 the court's jurisdiction, bears the burden of establishing subject  
17 matter jurisdiction.<sup>1</sup> *Hexom v. Oregon Dept. of Transp.*, 177 F.3d  
18 1134, 1135 (9th Cir. 1999). The court in effect presumes that it  
19 lacks jurisdiction until the plaintiff proves otherwise. *Kokkonen*  
20 *v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *United*  
21 *States v. Sumner*, 226 F.3d 1005, 1010 (9th Cir. 2000).

22 The nature of the burden of proof varies, however, depending  
23 on whether the motion is a facial or factual attack on the  
24 complaint. When considering a Rule 12(b) (1) motion attacking a  
25 complaint on its face, the plaintiff must affirmatively allege the

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26  
27 <sup>1</sup> With respect to a threshold motion to dismiss for lack of subject matter  
28 jurisdiction, if the plaintiff can show any arguable basis in law for the claim  
made, he may survive a Fed.R.Civ.P. 12 (b) (1) motion. *Musson Theatrical, Inc. v.*  
*Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996).

1 existence of federal jurisdiction because the court will not infer  
2 it from the allegations. *TOSCO v. Communities for a Better Env't*,  
3 236 F.3d 495, 499 (9th Cir. 2001), citing *Smith v. McCullough*, 270  
4 U.S. 456, 459 (1926). Also, with a facial attack, the court must  
5 presume that the plaintiff's allegations are true. *Miranda v.*  
6 *Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir. 2000). In contrast, no  
7 presumption of truth attaches to the plaintiff's allegations with a  
8 factual attack. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

9 A federal court presumptively lacks subject matter  
10 jurisdiction "unless the contrary affirmatively appears." *Stock*  
11 *West, Inc. v. Confederated Tribes of the Colville Reservation*, 873  
12 F.2d 1221, 1225 (9th Cir. 1989). Federal subject matter  
13 jurisdiction must exist at the time the action is commenced.  
14 *Morongo Band of Mission Indians v. California State Bd. of*  
15 *Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), cert. denied,  
16 488 U.S. 1006 (1989).

17 **B. Motion to Dismiss under Fed.R.Civ.P. 12(b) (6)**

18 In considering a motion to dismiss for failure to state a  
19 claim under Fed.R.Civ.P. 12(b) (6), the court must accept as true  
20 all material allegations in the complaint as well as all reasonable  
21 inferences that may be drawn from such allegations. *LSO, Ltd. v.*  
22 *Stroh*, 205 F.3d 1146, 1150 (9th Cir. 2000). The allegations of the  
23 complaint also must be construed in the light most favorable to the  
24 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th  
25 Cir. 2000). The purpose of a motion to dismiss under Rule 12(b) (6)  
26 is to test the legal sufficiency of the complaint. *Navarro v.*  
27 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). The court can grant the  
28 motion only if it is certain that the plaintiff will not be

1 entitled to relief under any set of facts that could be proven  
2 under the allegations of the complaint. *Cahill v. Liberty Mut.*  
3 *Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996).

### 4 **III. DISCUSSION**

5 Defendant moves to dismiss Plaintiffs' claims for negligence,  
6 nuisance, strict liability, *res ipsa loquitur*, and the request for  
7 punitive damages and attorney's fees (See ECF No. 9).

#### 8 **A. Strict Liability and Request for Punitive Damages and** 9 **Attorney's Fees**

10 First, Plaintiffs do not oppose dismissal of their strict  
11 liability claim or their request for punitive damages and  
12 attorney's fees. (See ECF No. 14 at 2). Accordingly, Defendant's  
13 motion to dismiss the strict liability claim and prayer for  
14 punitive damages and attorney's fees is granted. The portion of  
15 Plaintiffs' complaint alleging strict liability shall be dismissed  
16 and the prayer for punitive damages and attorney's fees is denied.

#### 17 **B. Res Ipsa Loquitur**

18 Defendant argues that Plaintiffs cannot present an independent  
19 claim for *res ipsa loquitur* because *res ipsa loquitur* is a theory  
20 of liability rather than a separate cause of action (ECF No. 9 at  
21 3). The Court agrees.

22 "Res ipsa loquitur is an exception to the general negligence  
23 rule, and it permits a party to infer negligence, as opposed to  
24 affirmatively proving it, when certain elements are met." See  
25 *Woosley v. State Farm Ins. Co.*, 18 P.3d 317, 321 (Nev. 2001).  
26 "[R]es ipsa loquitur is a theory of liability or a method of  
27 establishing liability for negligence; it is not a separate cause  
28 of action." See *Zander v. Tropicana Entertainment, Inc.*, 2014 WL

1 794212, at \*2 (D. Nev. Feb. 16, 2014) (dismissing res ipsa loquitur  
2 claim with prejudice). The res ipsa loquitur doctrine is "merely a  
3 rule of evidence, not a substantive rule of law." *Las Vegas Hosp.*  
4 *Ass'n, Inc. v. Gaffney*, 64 Nev. 225, 234 (Nev. 1947). The res ipsa  
5 loquitur doctrine in an FTCA case is determined by Federal law and  
6 federal law under *Zander* prohibits consideration of res ipsa  
7 loquitur as a separate cause of action. Accordingly, Plaintiffs'  
8 res ipsa loquitur claim, as a substantive claim, is dismissed.

9 **C. Negligence and Nuisance: Exhaustion of Administrative**  
10 **Remedies**

11 Defendant next argues that Plaintiffs failed to  
12 administratively exhaust their claims for negligence and nuisance  
13 and therefore the Court lacks subject matter jurisdiction over  
14 those claims (ECF No. 9 at 4-10).

15 The FTCA allows suits against the United States for certain  
16 torts committed by government employees acting within the scope of  
17 their employment. 28 U.S.C. § 1346(b). A plaintiff cannot  
18 initiate such action against the United States unless the claimant  
19 has first presented the claim to the appropriate Federal agency.  
20 28 U.S.C. § 2675(a). The requirement of exhaustion of  
21 administrative remedies is jurisdictional in nature and may not be  
22 waived. *Jerves v. United States*, 966 F.2d 517, 519 (9th Cir.  
23 1992).

24 The purpose of the exhaustion requirement is to encourage  
25 administrative settlement of claims and avoid unnecessary  
26 litigation. *Shipek v. United States*, 752 F.2d 1352, 1354 (9th Cir.  
27 1985). A claimant "need only file a brief notice or statement with  
28 the relevant federal agency containing a general description of the

1 time, place, cause and general nature of the injury and the amount  
2 of compensation demanded." *Goodman v. U.S.*, 298 F.3d 1048, 1055  
3 (9th Cir. 2002) (citing *Warren v. U.S. Dep't of Interior Bureau of*  
4 *Land Mgmt.*, 724 F.2d 776, 779 (9th Cir. 1984); *Avery v. U.S.*, 680  
5 F.2d 608, 610 (9th Cir. 1982)). Further, "a plaintiff's  
6 administrative claims are sufficient even if a separate basis of  
7 liability arising out of the same incident is pled in federal  
8 court." *Goodman*, 298 F.3d at 1055. A plaintiff is "not required  
9 to provide [the agency] with a preview of the details of his  
10 federal complaint, nor required to describe in more than minimal  
11 detail the factual predicate for his claim." *Id.* at 1056.

12 In this case, the Court finds that Defendant has been provided  
13 sufficient notice of Plaintiffs' negligence and nuisance claims  
14 within the meaning of § 2675(a). All that is necessary in terms of  
15 detail is the provision of enough facts for the government to begin  
16 an investigation. *Shipek*, 752 F.2d at 1355. Here, Plaintiffs'  
17 administrative claims make clear that they are based upon a fire  
18 that "burned beyond boundaries of controlled burn, engulfing  
19 [private property]" and an "expansion of fire to other [private]  
20 areas outside the 'prescribed' area" causing their private property  
21 to be destroyed. (See ECF Nos. 10-1 at 4; 10-2 at 2). The factual  
22 allegations presented by Plaintiffs would place a reasonable person  
23 on notice of the potential for negligence or nuisance claims  
24 relating to a uncontrolled prescribed burn damaging private  
25 property. Further, the administrative claims adequately provide a  
26 general description of the time, place, cause and general nature of  
27 the injury and the amount of compensation demanded. (See ECF Nos.  
28 10-1, 10-2). Accordingly, Defendant's motion to dismiss

1 Plaintiffs' negligence and nuisance claims for lack of subject  
2 matter jurisdiction is denied.

3 **IV. CONCLUSION**

4 For the reasons stated above, it is hereby ordered that  
5 Defendant's motion to dismiss (ECF No. 9) is **DENIED** as to  
6 Plaintiffs' First and Second Claims for relief. The motion to  
7 dismiss is **GRANTED** as to Plaintiffs' Fourth Claim for relief.

8 It is further ordered that Defendant's motion to dismiss  
9 Plaintiffs' Fifth Claim for Relief for Res Ipsa Loquitur as a  
10 substantive claim is **GRANTED**. This will not preclude Plaintiffs  
11 from raising, to the extent it is supported by the evidence, the  
12 doctrine of Res Ipsa Loquitur as a procedural rule of evidence.

13 It is further ordered that Plaintiffs' prayer for punitive  
14 damages and attorney's fees is **DENIED**.

15 **IT IS SO ORDERED.**

16 DATED: This 30th day of April, 2018.

17   
18 UNITED STATES DISTRICT JUDGE